

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
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U.S. DISTRICT COURT E.D.N.Y.

★ **FEB 04 2015** ★

LONG ISLAND OFFICE

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MICHAEL SPARKS DESIGN, LLC,

Plaintiff,

– against –

BRITCHIN POST, INC., et al.,

Defendants.
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ORDER
12-CV-3611 (JFB)(GRB)

JOSEPH F. BIANCO, District Judge:

On July 20, 2012, plaintiff Michael Sparks Design, LLC (“plaintiff”) filed a complaint in this action. On July 20, 2012, a summons was issued as to defendants Britchin Post, Inc., Liquid Web.com, and Merchantmoms, LLC (collectively, “defendants” or “defendant entities”). On October 23, 2012, plaintiff requested a Certificate of Default against defendants. The Clerk of the Court noted the default of defendants on October 23, 2012.

Defendants have had no legal representation throughout the duration of this action and have failed to answer or otherwise appear. Instead, a Lila Allocca (“Allocca”) has corresponded with the Court concerning these entities. The Court has held several telephone conferences with both plaintiff and Allocca, including on December 17, 2012 and July 10, 2013. During the July 10, 2013 conference, Allocca indicated that she would not be obtaining legal representation for the defendant entities, that she would not agree to the terms of plaintiff’s proposed settlement, and that she accepted that a motion for default judgment would proceed against the entities.

On July 23, 2013, plaintiff moved for default judgment against defendants. The Court entered judgment by default in favor of plaintiff on August 22, 2013, and referred the matter to Magistrate Judge Brown for a report and recommendation (“R&R”) on the issue of damages.

On January 27, 2014, plaintiff filed a notice of voluntary dismissal against defendant Liquid Web.com. On February 5, 2014, the Court dismissed Liquid Web.com as a defendant in this matter, and vacated the order of default judgment against it.

On September 29, 2014, Magistrate Judge Brown issued a scheduling order for the briefing by the parties on the issue of damages. Plaintiff did not submit any records, affidavits, or other evidence in support of its motion for damages, and defendants Britchin Post, Inc. and Merchantmoms, LLC have not filed any responses to the motion.

On December 30, 2014, Magistrate Judge Brown issued a memorandum recommending that the motion for damages be denied without prejudice to the filing of a further motion. The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R. (See R&R, dated December 30, 2014, at 3.) The date for filing any objections has since expired, and plaintiff has not filed any objection to the R&R.

Where there are no objections, the Court may adopt the report and recommendation without *de novo* review. See *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”); see also *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”); cf. 28 U.S.C. §

636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. See *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (“[B]ecause the waiver rule is non jurisdictional, we ‘may excuse the default in the interests of justice.’” (quoting *Thomas*, 474 U.S. at 155)).

Although plaintiff has waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution and HEREBY ADOPTS the well-reasoned and thorough R&R in its entirety.

IT IS ORDERED that plaintiff’s motion for damages against Britchin Post, Inc. and Merchantmoms, LLC is denied without prejudice.

If plaintiff intends to pursue its motion for damages, it may renew its motion within thirty days of this Order. Plaintiff is warned that if it fails to renew its motion within thirty days, the Court may dismiss the motion with prejudice without further notice for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, and a default judgment with no damages will be entered.

SO ORDERED

Dated: February 4, 2015
Central Islip, New York


JOSEPH P. BIANCO
United States District Judge